

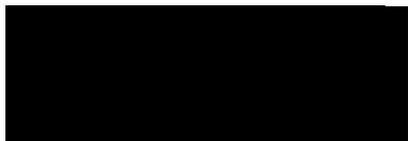
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



L1

FILE: 
MSC 05 237 15367

Office: SAN FRANCISCO, CA

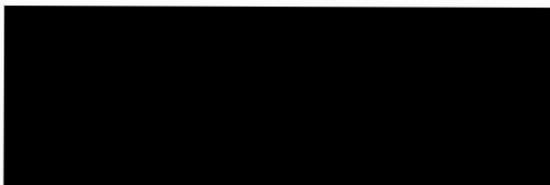
Date:

SEP 22 2009

IN RE: Applicant: 

APPLICATION: Application for Temporary Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been forwarded to the U.S. Citizenship and Immigration Services National Records Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained, or if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status filed pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director, San Francisco, California. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because he found that the evidence in the record failed to demonstrate that it is more likely than not that the applicant resided continuously in the United States from a date prior to January 1, 1982 and throughout the statutory period. He also determined that the applicant failed to demonstrate that she had violated her lawful status in a manner that was known to the government subsequent to her October 1981 nonimmigrant entry and prior to January 1982. Finally, the director indicated that the applicant was not a CSS/Newman class member.

On appeal, the applicant asserted that she is a CSS/Newman class member, that she has established continuous residence throughout the statutory period, that in October 1981 she entered without inspection, and that she is otherwise eligible to adjust to temporary resident status.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

The regulation at 8 C.F.R. § 245a.1(c) read in conjunction with the CSS/Newman Settlement Agreements provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

- (i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed [during the original filing period or the date that the alien was discouraged from filing], unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See Id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See Id.*

Documentary evidence may be in the format prescribed by U.S. Citizenship and Immigration Services (USCIS) regulations. *See Id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence, or if that doubt leads the director to believe that the claim is probably not true, to deny the application or petition.

At issue in this proceeding is whether the applicant is able to establish that she resided continuously in the United States throughout the statutory period. Here, the applicant has not met that burden.

On or near July 24, 1990, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On May 25, 2005, she filed the instant Form I-687.

The record includes statements and affidavits relating to the applicant’s claim that she resided continuously in the United States from a date prior to January 1, 1982 and throughout the requisite period, and that she is otherwise eligible to adjust, such as:

- 1) The Form I-687 submitted during July 1990 which the applicant signed under penalty of perjury and on which she specified at item 35 that she was absent from the United States only once during the statutory period. She stated that this absence was from July 18, 1987 through August 16, 1987, and that during this absence she traveled to Canada to visit relatives. She also stated on this form at item 32 that the date of her only child [REDACTED]’s birth in India is “unknown”.
- 2) The Form I-687 submitted on May 25, 2005 on which the applicant stated at item 32 that she was absent from the United States only once during the requisite period, and that this absence occurred during July/August 1987 when she traveled to Canada to visit relatives.
- 3) The September 23, 2003 affidavit of [REDACTED] in which [REDACTED] indicated that the applicant resided with him from 1983 through 1990 except for her short visit to Canada in 1987.

- 4) The applicant's December 6, 1999 declaration in which she stated that during July 1987 she traveled briefly to Canada to meet her sister [REDACTED] to have her travel with her to India. The applicant indicated that the purpose of the trip was that she might give birth to her daughter [REDACTED] with her mother present, as it is important in her culture that a mother be present when her daughter gives birth. The applicant indicated that her daughter was born on August 8, 1987 and that the applicant re-entered the United States without inspection after about one month.
- 5) The director's statements in the notice of decision in this matter and in the Legal Immigration Family Equity (LIFE) legalization notice of decision, issued four months prior to the decision in this case, that place the applicant on notice that in her husband's A-file is her statement which attests that she married in India on January 22, 1985.
- 6) Notes from the July 10, 2003 CSS/Newman legalization interview which indicate that the applicant testified that she married her husband on January 22, 1980 in India, that the two divorced in November 1994 and that they remarried in May 2002. The applicant also testified that she began residing in the United States in October 1981 and never departed again until July 1987.
- 7) The September 23, 2003 affidavit of [REDACTED] in which [REDACTED] attested that the applicant was already residing at [REDACTED] when he arrived in California.
- 8) The August 15, 1990 affidavit of [REDACTED] in which [REDACTED] indicated that the applicant, his cousin, came to him in 1981 and began living at his home at [REDACTED]
- 9) The Form I-687 which the applicant filed on May 25, 2005 on which she stated at item 31 where she was to list all her affiliations and associations with organizations, churches, etc. in order to help establish that she resided in the United States during the requisite period that she was part of the Stockton, California Sikh Temple: [REDACTED] from December 1982 through February 1990.
- 10) [REDACTED] letter on Sri Guru Nanak Sikh Temple, 2269 Bogue Road, Yuba City, California letterhead stationery which indicates that the applicant was a member at this temple and regularly attended religious events there from December 1981 through March 1990. This office notes that according to maps available at www.mapquest.com (accessed September 10, 2009), this temple is approximately: four hours and forty minutes drive from the address which the applicant stated on both Forms I-687 in the record was

her home address in Delano, California from 1981 through 1982; three hours and twenty minutes drive from her 1982-1983 home address in Watsonville, California as listed on the Forms I-687; and three hours and thirty minutes drive from her 1983-1990 home in Salinas, California as listed on the Forms I-687.

- 11) The July 1990 Form I-687 on which the applicant left blank item 34 where she was to “assist in establishing the required residence” by listing all affiliations or associations with organizations, churches, etc.
- 12) The September 23, 2003 affidavit of [REDACTED] on which he attested that the applicant lived continuously in California from October 1981 through the date that he signed that document in 2003.
- 13) The applicant’s Form I-512, Authorization for Parole of an Alien into the United States, which the applicant submitted during September 1994 and which she used to enter the United States on November 23, 1995. The applicant listed her home address as [REDACTED] Lake City, Utah on this form.
- 14) The 2005 Form I-687 on which the applicant had the immigration officer add, during the CSS/Newman legalization interview, that she lived in Salt Lake City, Utah during one month of 1994.

The record does not include contemporaneous evidence from the statutory period. The record does contain some contemporaneous evidence which places the applicant in the United States after the statutory period. The record also contains additional statements and affidavits related to the applicant’s claim that she resided in the United States during the statutory period.

At the outset, the AAO notes that the director made statements in the notice of decision which suggested that the applicant does not qualify for CSS/Newman class membership. The director also adjudicated the Form I-687 on the merits of that request and instructed the applicant to appeal the decision to the Administrative Appeals Office (AAO) by filing a Form I-694, Notice of Appeal. Thus, rather than denying the request based on a denial of the Class Membership Application and notifying the applicant of her right to seek review by a Special Master, the director adjudicated the instant application on the merits. Thus, the AAO will treat the application as if the director has found that the applicant has established class membership.²

The director issued a notice of decision in which he indicated that the applicant had submitted affidavits and made statements that are inconsistent with each other, and thus undermined the applicant’s claim that she resided in the United States throughout the requisite period. For example,

² This office does not have authority to review denials of CSS/Newman Class Membership Applications.

in his September 23, 2003 affidavit, [REDACTED] indicated that the applicant, his cousin, was already living at her 1981/1982 address on [REDACTED] when he arrived in the United States. Yet, in his August 15, 1990 affidavit, [REDACTED] indicated that the applicant came to him in 1981 at this same address on [REDACTED] and that since that time through the date of this affidavit, she had been living with him and he had been supporting her. Also, the letter from [REDACTED] at the Sri Guru Nanak Sikh Temple indicates that the applicant was a member at this temple and regularly attended religious events there from December 1981 through March 1990. Yet, the applicant did not list this temple on the 2005 Form I-687 at item 31 where she was to list any religious organizations and other associations with which she was affiliated in order to help establish that she resided in the United States during the requisite period.

The director pointed out also that the applicant stated in this proceeding that she married in India during 1980, that she entered the United States in October 1981 and that she did not exit again until July 1987. However, in a separate statement, submitted into her husband's A-file, the applicant stated that she married in India on January 22, 1985 and that after this she continued living in India. Also, the applicant indicated in this proceeding that she gave birth in India on August 8, 1987 and that she returned to the United States after about one month. Yet, on the 1990 Form I-687 in the record the applicant stated that she re-entered the United States on August 16, 1987.

In addition, on his September 23, 2003 affidavit, [REDACTED] attested that the applicant resided continuously in California from October 1981 through the date that he signed that document in 2003. Yet, at the CSS/Newman legalization interview, the applicant testified that she lived in Utah for one month during 1994.

The director found based on the many discrepancies in the record that the applicant had failed to establish continuous residence in the United States throughout the requisite period. He denied the application, in part, on this basis.

On appeal, the applicant failed to provide evidence to overcome the discrepancies identified by the director in the notice of decision. Counsel requested that the AAO refer to the LIFE legalization appeal brief regarding the discrepancies listed in the notice of decision: related to the applicant's contradictory claims of having married in India during 1980, of having no absences from the United States between 1981 and 1987, and of having married in India during 1985; and related to the applicant's contradictory claims of giving birth in India on August 8, 1987, of returning to the United States after one month, and of re-entering the United States on August 16, 1987.

In the LIFE legalization appeal brief, the applicant indicated through counsel that she never signed a statement that she married in India during 1985. The credibility of this statement is undermined by the rebuttal which the applicant presented through previous counsel in response to the director's notice of intent to deny in the instant matter. In that rebuttal, the applicant indicated that the marriage date in her statement should have been written January 2, 1980, but due to an honest clerical error, which she failed to notice when going over that document, the marriage date was written January 22, 1985 on her statement.

Regarding statements surrounding the birth of the applicant's daughter in India on August 8, 1987, the LIFE legalization appeal brief unsuccessfully attempted to address contradictory statements in the record which, on the one hand, state that in July/August 1987 the applicant traveled to Canada to visit relatives and those which, on the other hand, indicate that the applicant traveled to Canada on her way to India in July/August 1987 in order to give birth to her daughter in India. The LIFE legalization appeal brief does not address the additional contradictions raised by the director in this case which indicate that, on the one hand, the applicant stated that she returned to the United States on August 16, 1987 and, on the other hand, she indicated that she returned to the United States approximately one month after giving birth on August 8, 1987.

Counsel also asserted that the applicant never contradicted the affidavit that attests to her residing in California from 1981 through 2003 by stating that she had resided in Utah, as indicated by the director. However, the record reflects that the applicant testified at the CSS/Newman legalization interview that she resided in Utah for one month during 1994 and she listed an address in Salt Lake City on her Form I-512 filed in 1994.

Finally, the applicant is claiming that she entered the United States in October 1981 in an automobile driven by her father's friend across the border from Canada into the United States. She is claiming that the U.S. official at the port of entry never asked her for any identification, but instead spoke only to her father's friend and then allowed the automobile to enter the United States. The director treated this account as a claim that the applicant entered as a nonimmigrant in October 1981 and he denied the application in part because the applicant had not shown that she violated her nonimmigrant status in a manner that was known to the government prior to January 1, 1982. The applicant has asserted throughout this proceeding that this claimed entry in October 1981 was an entry without inspection, and that, therefore, she need not demonstrate that her unlawful status was known to the government prior to 1982.

The AAO finds that the applicant has failed to demonstrate by a preponderance of the evidence that she made an entry of any kind in October 1981. That is, one affidavit of [REDACTED] in the record indicates that the applicant approached [REDACTED] after arriving in the United States in 1981 and began living at his home on [REDACTED] in Delano, California. In a second affidavit of [REDACTED] in the record, the applicant was already residing at this same address on [REDACTED] in Delano, California when [REDACTED] arrived in California. According to the Sri Guru Nanak Sikh Temple letter in the record, the applicant was a member and regular participant at this temple in Yuba City from 1981 through 1990. Yet, the address in Delano where the applicant claimed to be living during 1981-1982 is over four hours and forty minutes drive from Yuba City. Moreover, she claimed affiliation with a different Sikh temple in Stockton, California from 1982 through 1990 on the 2005 Form I-687. These major inconsistencies in the record regarding accounts meant to support the applicant's claim that she was present in the United States during 1981 through 1982 undermine her claim that she entered the United States in 1981 and began residing in the United States at that time. There is no contemporaneous evidence in the record to support a finding that the applicant entered the United States in 1981 or that she was present in this country during 1981. The AAO finds that the applicant has not established that she entered the United States in 1981 and began residing in this country at that time.

In sum, the AAO finds that the discrepancies discussed herein cast serious doubt on all the evidence in the record, including the applicant's claim that she resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988. Such inconsistencies may only be overcome through independent, objective evidence of the applicant's claim that she resided continuously in the United States during the statutory period.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

This office finds that the various statements and affidavits in the record which were submitted to substantiate the applicant's claim of continuous residence in the United States during the statutory period are not objective, independent evidence such that they might overcome the deficiencies in the record relating to the applicant's claim that she maintained continuous residence in the United States from a date prior to January 1, 1982 and throughout the statutory period, and that these documents are not probative in this matter.

The applicant has failed to establish continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and throughout the statutory period. Thus, she is not eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements. The appeal is dismissed on this basis.

The director also made statements indicating that the applicant's previous counsel had been convicted of repeatedly bribing INS officials and that it appeared that a bribe had been submitted in relation to the instant application. The applicant has failed to establish continuous residence during the requisite period. The appeal must be dismissed on this basis. Thus, this office need not address the impact that evidence of a bribe would have on this adjudication, if any, and it does not do so in this analysis.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.